COLORADO OPEN SPACE COUNCIL

IBLA 81-970 Decided May 31, 1983

Appeal from decision of the Geological Survey, denying protest against approval of application for permit to drill on oil and gas lease C-12826.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness

The Bureau of Land Management is directed by sec. 603(c) of the Federal Land Policy and Management of Act of 1976, 43 U.S.C. § 1782 (1976), to manage lands under review for wilderness suitability so as to prevent impairment of wilderness characteristics, except that it allows the continuation of existing mining, grazing, or mineral leasing uses in the same manner and degree in which they were being conducted on the date of enactment, Oct. 21, 1976, and except to the extent that the exercise of valid existing rights is not prevented under sec. 701(h).

2. Environmental Policy Act -- Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

Where an administrative decision is made that a proposed action is not a major Federal action which will significantly affect the quality of the human environment, so that no environmental impact statement need be filed, that decision will be affirmed on review if it appears to have been made by an authorized officer, in good faith, based on a proper and

sufficient environmental analysis compiled according to established procedures, and is the reasonable conclusion from such record.

APPEARANCES: Larry Mehlhaff, for the Colorado Open Space Council; Marla E. Mansfield, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Geological Survey.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Colorado Open Space Council (COSC), has appealed from a June 24, 1981, decision of the Acting Chief, Conservation Division, 1/ Geological Survey (Survey), which denied appellant's protest 2/ against an earlier Survey decision to grant an application for a permit to drill well No. 1-32C on Federal oil and gas lease C-12826. An answer was filed by Survey. 3/

Federal oil and gas lease C-12826 issued effective June 1, 1971, for a 10-year term. The application for permit to drill (APD) was filed by the lessee on June 18, 1980, and approved by Survey May 28, 1981. The approval was granted for drilling at the third location considered. This site was located in the NW 1/4 NW 1/4 sec. 32, T. 10 S., R. 98 W., sixth principal meridian, Mesa County, Colorado. 4/ At the time of Survey's approval the Bureau of Land Management (BLM), as the surface managing agency, was studying this area for possible designation as wilderness pursuant to section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976). The site lies at the edge of the Little Bookcliffs Wilderness Study Area (CO-070-066), and the approval of the APD specified that "[t]he operator will not create any surface disturbance in excess of that approved." Drilling commenced on May 31, 1981.

Prior to approval, Survey conducted a categorical exclusion review (CER) pursuant to the guidelines found in the Departmental manual (DM). Survey found that the proposed drilling program fell under the categorical exclusion

1/ The minerals-related functions of the Conservation Division of Geological Survey have since been absorbed into the Minerals Management Service under the provisions of Secretary's Order No. 3071, dated Jan. 19, 1982. See 47 FR 4751 (Feb. 2, 1982). See also Secretary's Order No. 3087, dated Dec. 3, 1982, as amended, Feb. 3, 1983, 48 FR 8983 (Mar. 2, 1983), transferring some of these functions to BLM.

2/ Survey characterized appellant's action as an appeal.

3/ The answer also asked that the appeal be dismissed for lack of service. Survey claims that no appeal was received at the Reston office. However, the Reston office forwarded the appeal to this Board. That office did receive a "faxed" copy of the appeal, but did not stamp it with a date of receipt. Therefore, we presume it to have been timely and deny Survey's motion. 43 CFR 4.411 does not specify that an appeal must be mailed.

4/ A high voltage electrical transmission line runs over the drill site, which is also over a coal lease. Holders of these two interests concurred in the drill proposal.

provisions of 516 DM 2.3(A) and 516 DM 6, Appendix 2. As a result, Survey determined that an environmental assessment would not be required for issuance of the permit to drill and that further review was not necessary under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1976).

The Survey decision of June 24, 1981, was the basis for the appeal to this Board by COSC. This decision noted that a CER had been conducted which required analysis of nine specific criteria, that approval was coordinated with the surface management agency and was subject to conditions of approval and supplemental production stipulations. The Survey decision concluded that approval of the APD on lease C-12826 based on the CER was appropriate and in accordance with law, regulations, and Departmental manual procedures. The decision further stated:

> When the wilderness review procedure was established by Congress, existing rights were recognized and protected. Both the wording of section 603 and the inclusion of 701(h) establish that those rights would be preserved. Section 603 establishes a management standard of non-impairment, but the application of that standard is limited by the requirement that the Secretary recognize valid existing rights. Further, section 603 does not bar all activities that may result in "degradation," but rather requires the Secretary to "prevent unnecessary or undue degradation." Allowing a lessee to develop his oil and gas lease, in the least impairing manner, is consistent with, and gives effect to the provisions of sec. 603 and 701(h) of FLPMA by recognizing the rights conveyed in this lease. Of course, all leases are further subject to the terms and conditions found in the lease itself and stipulations thereto. In this instance, the lease contains no additional wilderness protection stipulations which would further limit the lessee's development rights. Therefore, development cannot be precluded. Union Oil Co. of California v. Morton, 512 F.2d 743, 749 (9th Cir. 1975).
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> Allowing development on this lease does not limit Congress' ability to act on the inclusion of the area in the wilderness system since Congress has already stated that valid existing rights, such as those involved here, will be recognized. The question then is whether the CER process has adequately addressed the constraints on the manner of development. We find that it has. During the analysis for this proposal, both the original and the first alternative drilling sites were rejected, because they would have created unacceptable impacts on the area. The approved permit also includes a condition recognizing the special nature of the area involved. The approved drill site thus represents the least impairing site consistent with the lessee's right to reasonable development and enjoyment of the lease.

Appellant (the protestant below) invoked two different statutes in its challenge to the lessee's right to drill. Appellant argued that approval of the APD would diminish the suitability of the Little Bookcliffs Wilderness Study Area for designation as wilderness, pursuant to FLPMA. Appellant also

objected to the conclusion reached in the CER conducted pursuant to NEPA. Appellant asserted that approval involved significant and precedent-setting impacts sufficient to require the preparation of an environmental assessment. 516 DM 2.3(A)(3)(b). Appellant also claimed that Survey did not provide the public and COSC with sufficient information regarding the APD process and notification of decision, and that this failure violated 40 CFR 1506.6 and 516 DM 1.

Section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1976), directs the Secretary of the Interior to inventory the public lands and identify roadless areas of 5,000 acres or more having wilderness characteristics for review. The Secretary is then directed to make recommendations to the President regarding the suitability or nonsuitability of each area identified and reviewed with respect to suitability for preservation as wilderness. Guidance for the management of areas undergoing review appears in section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976), which states in pertinent part:

> During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

Section 701(h) of FLPMA tempers the interim management mandate for areas under review. This provision states: "All actions by the Secretary concerned under this Act shall be subject to valid existing rights." 90 Stat. 2786, 43 U.S.C. § 1701 note (1976).

[1] Section 603(c) provides two standards for management of areas under review. BLM is authorized to manage the lands so as to prevent impairment of wilderness characteristics unless the lands are subject to an existing mining, grazing, or mineral leasing use. Under section 603(c), only existing uses conducted in the "same manner and degree" as on October 21, 1976, can be regulated so as to prevent unnecessary or undue degradation of the environment. Rocky Mountain Oil and Gas Association v. Watt (RMOGA), 696 F.2d 734, 750 (10th Cir. 1982); State of Utah v. Andrus, 486 F. Supp. 995, 1005 (D. Utah 1979). Although the instant lease predated FLPMA, no drilling was underway on October 21, 1976. Therefore, the section 603(c) grandfather clause for existing uses is not applicable, making nonimpairment the appropriate management standard in this case. However, the nonimpairment standard cannot be used to defeat a lessee's valid existing right to develop a lease. See Havlah Group, 60 IBLA 349 (1981); Dale F. Gimblett, 60 IBLA 341 (1981).

The existence of this lease on October 21, 1976, invokes the valid existing rights protection provided by section 701(h) of FLPMA. The RMOGA court pointedly declined to address the Department of the Interior policy,

articulated in Solicitor's Opinion, M-36910 (Supp.), 88 I.D. 909 (Oct. 5, 1981). See 696 F.2d 746 n.17. In that opinion the Solicitor opined that the application of the nonimpairment standard to a pre-FLPMA lease might be impossible because of the protection which section 701(h) of FLPMA affords valid existing rights. The Solicitor stated:

> In general, however, the nonimpairment standard governs activities unless this would unreasonably interfere with enjoyment of the valid existing rights. When the nonimpairment standard would unreasonably interfere with the use of the rights conveyed, the holder of the rights may exercise the rights although it impairs the area's suitability for preservation as wilderness.

88 I.D. at 913. Exercise of such a right would not be unlimited, given the statutory mandate to manage areas under study so as to prevent unnecessary or undue degradation. 43 U.S.C. § 1782(c) (1976). "By implication, this standard allows the Secretary to authorize uses or activities necessary to the purposes of the valid existing rights subject to reasonable mitigating measures to protect environmental values." 88 I.D. at 914. By memorandum dated December 10, 1982, the Associate Solicitor, Energy and Resources, reaffirmed this position with respect to the management of oil and gas lease exploration and development activity on pre-FLPMA leases. 5/ We find ourselves in substantial agreement with the Solicitor's analysis.

[2] Appellant asserted that NEPA requirements have not been met because Survey neither prepared a "finding of no significant impact" to make available to the public, nor notified appellant of the APD as appellant requested, nor prepared an environmental assessment. NEPA requires preparation of an environmental impact statement for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c) (1976). Survey is obligated under NEPA to develop a reviewable record reflecting consideration of all relevant factors in making its threshold determination as to the significance of a proposed action. Survey conducted its CER in order to make this determination. A categorical exclusion is defined in 40 CFR 1508.4 as follows:

> "Categorical Exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

5/ We note that as part of the continuing resolution funding Departmental activities in fiscal year 1983, P.L. 97-394, section 308 (Dec. 30, 1982), Congress was silent as to the treatment of permits on wilderness study areas not so designated by Congress. See also Departmental Instruction Memoranda 83-237 (Jan. 7, 1983) and 83-120 (Nov. 22, 1982).

Thus, an environmental assessment need not be prepared if the action contemplated is found to be within the scope of a categorical exclusion.

The Departmental Manual, at 516 DM 2.3, outlines the criteria used for the determination of whether or not an action is categorically excluded from the NEPA process. A list of categorical exclusions, based on the criteria stated in 516 DM 2.3A, appears at 516 DM 6, Appendix 2. The list includes: "Approval of an Application for Permit to Drill (APD) for exploratory [onshore] oil and gas wells prior to the first confirmation drilling." 516 DM 6 Appendix 2, 2.4B(2)(a).

Individual actions within a categorical exclusion may under certain circumstances be excepted. That is, there may be exceptions to the exclusions. In such cases, an environmental assessment would be required, even though the action is categorically excluded under the provisions of 516 DM 2.3A(1) and (2). These exceptions to the categorical exclusions reviewed are as follows:

> (a) Have significant adverse effects on public health or safety.
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> (b) Adversely affect such unique geographic characteristics as historic or cultural resources, park, recreation, or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers, prime farmlands, wetlands, floodplains, or ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks.
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> (c) Have highly controversial environmental effects.
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> (d) Have highly uncertain environmental effects or involve unique or unknown environmental risks.
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> (e) Establish a precedent for future action or represent a decision in principle about a future consideration with significant environmental effects.
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> (f) Be related to other actions with individually insignificant but cumulatively significant environmental effects.
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> (g) Adversely affect properties listed or eligible for listing in the National Register of Historic Places.
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> (h) Affect a species listed or proposed to be listed on the List of Endangered or Threatened Species.
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> (i) Threaten to violate a Federal, State, local, or tribal law or requirements imposed for the protection of the environment or which require compliance with Executive Order 11988 (Flood-plain Management), Executive Order 11990 (Protection of Wetlands), or the Fish and Wildlife Coordination Act. [Emphasis added.]

516 DM 2.3A(3).

The Survey decision of June 24, 1981, recognized all nine of the above exceptions to categorical exclusions and specifically addressed those raised by COSC. This decision concluded that 516 DM 2.3A(3)(b) applied to established wilderness areas, not wilderness study areas, and that the environmental effects of drilling an oil well were not highly controversial.

Appellant argued that either exception (b) or (c) should apply to the categorical exclusion for approval of an APD in this case. COSC maintained that (c) should apply either because it brought this APD into controversy or because the activity is inherently controversial. We cannot agree with appellant's arguments. COSC cannot bootstrap itself into the position of invoking section (c) by creating a controversy. Further, we cannot find that exploratory drilling of an onshore well has highly controversial effects. The dispute arose because of the location of the well site, not because of COSC's concern that all oil well drilling has highly controversial impact.

The Little Bookcliffs Wilderness Study Area is not a designated "wilderness area." It is under study, a status not explicitly addressed in (b). The area has been identified as being in a roadless area of sufficient size to warrant an examination with respect to attributes listed in the CER criteria. A case by case analysis is required to determine whether any unique characteristics such as those listed in (b) would be adversely affected. The record does not indicate that the selected site possesses unique characteristics. 6/

A review of the documents filed by the lessee and the study and site inspections conducted by Survey and BLM personnel, which led to the rejection of the first two sites selected, restrictions on drill site disturbance, provisions for environmental protection in the event that a producing well is developed, and detailed restoration provisions, adequately provided for the prevention of unnecessary or undue degradation. The permit further provided for protection of coal beds which are subject to an existing coal lease and drill height limitations to insure safety, as the drill site was adjacent to an existing 69 KV electrical transmission line.

When an agency decides that an environmental impact statement need not be filed, or that further environmental assessment need not be made, that decision will be affirmed on review where, as here, it appears to have been made by an authorized officer, in good faith, based on a proper and sufficient record compiled in accordance with standard procedures, and is the reasonable result of such record. See, e.g., Julie Adams, 45 IBLA 252 (1980); Citizens' Committee to Save Our Public Lands, 29 IBLA 48, aff'd, Citizens' Committee to Save Our Public Lands v. Andrus, Civ. No. C-77-633 SC (N.D. Cal. May 19, 1977), and cases cited. The Board concludes that Survey followed its procedures, addressed appellant's objections, and correctly found further environmental analysis unnecessary.

6/ A given location within a wilderness area or wilderness study area is not necessarily inherently unique.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Will A. Irwin
Administrative Judge